

Strasbourg, 12 January 2017

## CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

### Questionnaire for the preparation of the CCJE Opinion No. 20 (2017):

#### “The role of courts with respect to uniform application of the law”

*Please in your answers do not send extracts of your legislation but describe the situation in brief and concise manner.*

*Comments on what is also happening in practice, and not only on point of law, will be much appreciated.*

### Introduction

The first section deals with the concept of the uniform application of the law in the way, in which it possibly exists, is understood and is operated in different member states of the Council of Europe.

The second section proceeds to discuss the role of the legislative and executive powers in ensuring the uniform application of the law through adoption of consistent legislation and executive acts.

The third section highlights the role of courts in ensuring the uniform application of the law through consistent court case law. **This section, due to the mandate of the CCJE, is the key section of the Opinion.**

The Bureau and the Secretariat of the CCJE would like to strongly thank you for your cooperation and contributions.

### 1. Concept of the uniform application of the law

- 1.1 Is there in your country a concept of the uniform application of the law? Is it formal, established at the level of the Constitution and/or legislation, or rather informal,

discussed and set at various level and applied in practice through common understanding? Is it a combination of both approaches, to various extents?

In Georgia a concept of the uniform application of the law is a combination of both formal requirements established at the level of Constitution and other laws as well as informal requirements, discussed and set at various level and applied in practice through common understanding.

1.2 What is understood in your country under the concept of the uniform application of the law?

It is understood in the form of:

- **consistent legislation to be adopted at legislative level**

This implies that the process for enacting laws should be transparent, accountable and democratic.

Laws must be formulated with sufficient precision and shall be foreseeable as to their effects. Retroactivity of the laws shall be prohibited if they negatively affect rights and legal interests.

Parliament shall not be allowed to override fundamental rights by ambiguous laws.

Frequent amendments in laws are not encouraged because they negatively affect legal certainty in the country.

- **uniform practices by the executive institutions and law enforcement bodies**

Executive institutions and law enforcement bodies have a duty to respect and apply in a foreseeable and consistent manner the laws that are enacted. They shall not apply discriminatory practices and shall ensure the protection of human rights and equality before the law.

Undertakings and promises held out by the executive institutions to individuals should be honoured (the notion of “legitimate expectation”).

Although discretionary power is necessary to perform a range of governmental tasks, such power should not be exercised in a way that is arbitrary. The procedures shall exist to prevent its abuse. A law which confers discretion to a state authority must indicate the scope of that discretion and the manner of its exercise with sufficient clarity.

- **uniform case law developed by courts**

Yes. Case law of the courts shall be coherent. Existing of conflicting decisions within the supreme or constitutional court is contrary to the principle of legal certainty. It is therefore expected that courts, especially the highest courts, establish mechanisms to avoid conflicts and ensure the coherence in their case law. Final judgments shall not be called into question and shall be enforced.

All three requirements are equally important.

- 1.3 What is the rationale of the uniform application of the law in your country and which kind of outcome for the population it is supposed to produce?

Requirement of legality, legal certainty and prohibition of arbitrariness; ensuring access to justice, respect for human rights, non-discrimination and equality before the law, which are the necessary elements of the rule of law in the country.

## **2. Role of the legislative and executive powers in ensuring the uniform application of the law**

- 2.1 Are there in your country formal or informal requirements for ensuring the uniformity in the legislative process?

There are both formal and informal requirements for ensuring the uniformity in the legislative process. Formal requirements are included in various provisions of the Constitution, Law of Georgia on Normative Acts, Regulation of the Parliament and other laws (for details, see information below).

- 2.2 Is there a hierarchy of laws?

Yes. It is established by the Constitution and the Law of Georgia on Normative Acts as follows:

1. Constitution of Georgia, Constitutional Law of Georgia;
2. Constitutional Agreement of Georgia;
3. International treaty and agreement of Georgia;
4. Organic law of Georgia;
5. Law of Georgia, Decree of the President of Georgia, Reglament (Regulation) of the Parliament of Georgia.

Constitution of Georgia and all other legislative acts must be in conformity with generally recognized principles and norms of international law.

- 2.3 How the conformity of national laws to treaties and other international instruments is ensured? How the latter are applied in your country: directly or through national implementing legislation?

According to the Constitution of Georgia, international treaties and/or agreements, if they do not contradict with the constitution, have supremacy over national laws.

International treaties and other international instruments form part of the national legislation and are applied directly. There is no requirement to adopt national implementing legislation.

- 2.4 What are the arrangements in cases of contradictions between national laws, or between national law and treaty?

There is a hierarchy of laws established by the Constitution and the Law of Georgia on Normative Acts as described above (see 2.2). In case of contradiction between national laws, the law which has a higher place in the hierarchy prevails. In case of contradiction between national laws that belong to the same hierarchy the law which is adopted later and/or is special prevails.

In case of contradiction between the national law and the international treaty, the international treaty prevails (if it does not contradict with the Constitution).

- 2.5 How usually law making process is carried out in your country? Which of the powers of the state has in practice dominant role in this process?

The following bodies have a power/right to initiate a law:

1. Government of Georgia;
2. Member of the Parliament;
3. Group of Parliament Members;
4. Parliaments of the Abkhazia and Adjara Autonomous Republics;
5. 30 000 individuals (having right to participate in the election)

(Article 67 of the Constitution)

In practice the Government of Georgia has a dominant role in this process. Members of the Parliament are also active in law initiating process.

- 2.6 Are acts of the executive power source of law in your country and in that respect are they legally binding for the courts?

Legal acts of Georgia are divided into Normative Acts and Individual Acts.

Normative Acts are divided into Legislative Acts (laws) and Sub-legislative normative Acts.

Acts of the executive power are Sub-legislative normative acts. They shall be in conformity with Legislative acts. They form source of law and are legally binding for the courts.

- 2.7 In your opinion, are laws too often amended in your country and does it affect the legal certainty in the country?

Yes. Laws are amended quite frequently in Georgia and it does affect the legal certainty in the country.

### **3. Role of courts in ensuring the uniform application of the law**

- 3.1 Has the court case law in your country binding legal effect and is it a source of law? If yes, to what extent? To the same extent as the national legislation?

The court case law, except decisions of the Grand Chamber of the Supreme Court of Georgia, does not have binding legal effect and is not a source of law.

Decisions of the Grand Chamber of the Supreme Court of Georgia (highest cassation court) are considered as a source of law and have binding legal effect for all other courts of the general jurisdiction (Article 17.5 of the Law of Georgia on Courts of General Jurisdiction).

Panel consisting of 3 judges of the Supreme Court, which deals with a particular case, if it does not agree with the previous decision of the Grand Chamber on a similar case, has a right to submit a dispute for consideration to the Grand Chamber to deliver a new

judgment (or the same one). Thus, over time, the decision of the Grand Chamber can be replaced by the new decision of the Grand Chamber only.

- 3.2 If the court case law in your country does not have binding legal effect, to which extent it is recognised as important for judges, at formal or informal level?

Even if they do not have a binding legal effect, the decisions of the Supreme Court of Georgia (except decisions of the Grand Chamber that are binding) are widely recognized as important and necessary to consider for all other courts. Lower instance courts are expected to follow the decisions of the Supreme Court.

- 3.3 In either case, have the courts a role to unify in any way the case law, and if yes, which courts and in which way? Are there special arrangements within each court – or between different courts at horizontal or vertical level within the hierarchy of courts – to ensure uniformity?

All courts of Georgia are expected to unify the case law. However the Supreme Court has a leading role in this process.

There are special arrangements between courts both at horizontal and vertical level to ensure uniformity.

All decisions of the Supreme Court are published in print for judges and available on the web-site of the Supreme Court for general public.

The Supreme Court conducts regular meetings with all courts on the issue of unity of case law.

There are guidelines published by the Analytical Department of the Supreme Court containing the extracts from the important decisions of the Supreme Court containing various interpretations on legal issues.

- 3.4 Are there specialised courts in your country? Is there a hierarchy of specialised courts if such system exists? Is it possible to challenge final judgments of specialised courts before superior judicial body (Supreme Court or court with a similar role). If yes, please explain in short.

At present there are no specialised courts in Georgia.

- 3.5 Is the unification of case law (mentioned in the question 3.3) determined by the Constitution, laws, by-laws or by long lasting practice?

Unification of case law is determined by long lasting practice. It is also encouraged by the Law on Courts of General Jurisdiction (Article 41).

- 3.6 Are judgments of such courts (mentioned in the question 3.3) obligatory to follow for:

- judges/panels of that court;
- all judges in the country;
- are there any consequences for judges if they do not follow case law of higher court?

All judges in the country are obliged to follow the decisions of the Grand Chamber of the Supreme Court. All judges are also expected (but not obliged) to follow the decisions of the panels of the Supreme Court.

If judge does not follow the decisions of the Supreme Court his/her decisions will be overturned by the higher instance courts. This will be reflected in the evaluation of quality of judge's work. There is no other liability for judges.

- 3.7 If judgments of such courts are not obligatory, what kind of practical effect they may have?

Decisions of the Supreme Court are important source for interpretation of the law. They are widely used not only by judges, but also lawyers, scholars and other legal professionals. They play an important role in ensuring the uniform application of law, which greatly contributes to legal certainty in the country.

In addition to the Supreme Court decisions, number decisions of the first instance and appellate courts (that were not appealed or remained unchanged by the Supreme Court) are also subject of utmost interest from scholars and legal practitioners.

- 3.8 What are the procedures, if any, applied when there are contradictions or deviations in the case law between different courts or different levels within the same court including superior courts (appealing, rendering legal opinions of court departments, preliminary rulings *in abstracto* etc.)?

In case of contradictions or deviations in case law between different courts at the same level, appealing the decision at the higher court (appellate courts or the Supreme Court) is the available procedure.

In case of contradiction between the appellate courts or within the appellate court the appealing the decision at the Supreme Court is the available procedure.

In case of contradiction within the panels of the Supreme Court, the panel which does not agree with the decision of the other panel is obliged to submit a case to the Grand Chamber of the Supreme Court. Decision of the Grand Chamber is obligatory to all courts and judges.

- 3.9 Either in the case when the case law has binding legal effect, or in the case when it is not binding but otherwise has some impact, in which, if any, situations would it be regarded as permissible or maybe even necessary to depart from the case law?

There are no such situations directly specified or described somewhere. However, every judge has a right to make a decision which differs from the case law if such decision is firmly grounded. Even Grand Chamber can change its previous case law if it finds its decisions not corresponding to new developments or new reality.

- 3.10 What is the role of the Supreme Court or any other highest court in your country in establishing uniformity of application of law? Please explain how it is possible to access the Supreme Court and are there any discretionary powers in granting right to hear the case, and what would be the criteria for such possibility (filtering criteria)?

The role of the Supreme Court is crucial in establishing uniformity of application of law.

Decisions of the Supreme Court in practice have a binding legal effect for all judges, while decisions of the Grand Chamber of the Supreme Court are obligatory for all judges pursuant to the law.

Supreme Court is the highest cassation court of the country. It does not deal with all cases. There is an admissibility criteria established by law. Supreme Court will admit the cassation appeal for consideration if:

- a) The dispute concerns free speech and freedom of expression;
- b) The case is important for the development of the law and the establishment of the uniform case law;
- c) Decision of the appellate court contradicts with the case law of the Supreme Court on this matter;
- d) In civil dispute – the case is dealt with significant procedural violation by the appellate court and this violation might have effect on the final outcome of the dispute; in criminal dispute – the case is dealt with significant legal or procedural violation by the appellate court and this violation might have effect on the final outcome of the dispute;
- e) The appellate court issued the second default judgment or approved the first default judgment regarding the case.

3.11 How is the case law of the European Court of Human Rights and other supranational courts or quasi-judicial bodies ensured and applied at national level, and how such case law affects the unification of national case law in your country?

Case law of the ECtHR is part of the national law of Georgia. It has supremacy over national laws (see 2.2). Georgian courts are obliged to apply ECtHR case law in their decisions. It significantly effects the unification of national case law in the country.

3.12 In which way the court case law, including above-mentioned international case law, is assembled, published and made otherwise accessible for:

- judges;
- other legal professionals;
- general public.

It is published in print.

It is available on the web-site of the Supreme Court of Georgia [www.supremecourt.ge](http://www.supremecourt.ge)

There is a special program to find the decisions of the Supreme Court on the web-site. There is a special program to find ECtHR decisions translated into Georgian language on the web-site of the Supreme Court.

Analytical Department of the Supreme Court translates all decisions of the ECtHR made in relation to Georgia and other important decisions in Georgian language.

3.13 Is the access to such database free of charge? Yes.

3.14 Are courts the only source of information or there are more providers (on a commercial basis or through free access)? If the latter is the case, are such providers independent entities, and are they operating on commercial or not commercial basis?

There are other providers who operate on not commercial basis.

3.15 What are the challenges for the unification of the case law in your country? Does the quality of national legislation pose a challenge – for example the need in modern society to use relatively broad definitions and legal concepts?

Main challenge is the frequent amendments in laws, which effects the legal certainty in the country.

3.16 Any other point you wish to raise.